UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOUSING WORKS, INC. Employer, and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW Petitioner.	§ § § § § § § § § §	CASE 29-RC-256430

THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ORDER DENYING THE EMPLOYER'S REQUEST TO WITHDRAW FROM THE STIPULATED ELECTION AGREEMENT AND REQUEST TO STAY THE ELECTION

Glenn J. Smith
Seyfarth Shaw, LLP
620 Eighth Avenue
New York, NY 10018-1405
gsmith@seyfarth.com
(212) 218-3502

Jason J. Silver
Seyfarth Shaw, LLP
620 Eighth Avenue
New York, NY 10018-1405
jsilver@seyfarth.com
(212) 218-5282

Attorneys for the Employer
Housing Works, Inc.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOUSING WORKS, INC. Employer, and RETAIL, WHOLESALE AND DEPARTMENT STORE UNION, UFCW Petitioner.	§ § § § § § § § § §	CASE 29-RC-256430

THE EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ORDER DENYING THE EMPLOYER'S REQUEST TO WITHDRAW FROM THE STIPULATED ELECTION AGREEMENT AND REQUEST TO STAY THE ELECTION

I. PRELIMINARY STATEMENT

On July 9, 2020, the Regional Director issued a remarkable Order[1] (the "Order" - Exhibit A) denying Housing Works ("Housing Works" or the "Employer") request to withdraw from the Stipulated Election Agreement ("SEA" - Exhibit B) approved by the Region on March 5, 2020. The Order was "remarkable" in that the Regional Director compelled the parties to file responses to her April 28, 2020 Notice to Show Cause ("NTSC" - Exhibit C), but failed to address or examine the very issue that she had the parties brief - whether "unusual or special circumstances" exist to permit Housing Works to withdraw from the SEA. Indeed, the Order never examines the circumstances and instead finds that nothing happened to the stipulated unit or the Employer since March 5, 2020. In doing so, the Order completely ignores that the effects of the COVID-19

[1] References herein to the Order will be abbreviated as "Ord. at [page number]."

pandemic and the Employer's restructuring of its business operations in response to the pandemic have dramatically shifted the circumstances surrounding Retail, Wholesale, and Department Store Union's ("RWDSU" or "Union") February 14, 2020 Representation Petition ("Petition" - Exhibit D), the SEA, and the Employer. The Regional Director further ignores that the SEA is now no longer for a New York City wide bargaining unit and that it now both includes and excludes employees working in the same classifications in the very same city. The Regional Director neglects to consider any factors that warrant the Employer to withdraw from the SEA.

The Order states that the Employer's request to withdraw from the SEA should be denied because:

> The Employer's concerns about laid off and newly hired employees and work sites can be handled using the Board's established eligibility rules and challenged ballot procedures. To be eligible to vote in a Board election, the employee must be hired and working on the established eligibility date and in employee status on the date of the election.

Ord. at 4. This obtuse proclamation is essentially the sum of the Regional Director's analysis. Instead of analyzing whether "unusual or special circumstances" exist to permit withdrawal from the SEA, the Regional Director concludes that if she changes nothing but the election mailing, return and counting dates, the parties can simply use the voter list ("Voter List") served by the Employer on March 6, 2020 to conduct the election.[2] In essence, the Region concludes that the parties can determine who is eligible using the existing eligibility date of February 15, 2020 and this alone means there has been no unusual or special circumstances permitting withdrawal from the SEA.

[2] Oddly, the Regional Director did not even order an updated Voter List be produced despite knowing that the list and the details for the remaining employees has changed dramatically.

This is not the standard that should have been applied. No one is questioning whether the parties can determine who would be eligible as of a certain date. Of course, anyone could do that using any date that is desired. In fact, the parties could wait 20 years and could decide if there are any remaining eligible employees at any covered location. If that was the test to be applied by the Region, the Employer would not have initiated this examination of the SEA. Rather, the Employer asserts that its business changes, its new lines of business, the pandemic, its new locations, its closed locations, and its markedly changed workforce permits withdrawal from the SEA. The very point of all of this is that the SEA no longer produces the election to which the parties agreed. On its face, it seems the Board may never see a more self-evident demonstration of "unusual or special circumstances."

The Union argues that no unusual or special circumstances exist. In large part, the Union bases its view off of the falsely asserted position that the new employees working at new locations or under new lines of business in New York City are just temporary. This argument from the Union essentially concedes that the employees at Housing Works' new locations and new businesses should be admitted to the voting unit, but for the fact that the RWDSU argues their asserted temporary status excludes them. After all, the new employees work in the same city as their included colleagues and hold positions in the same classifications as the other employees on the Voter List. The Order fails in any respect to consider the Union's urging to exclude the new locations as "temporary" and generally fails to consider the questions posed by the Employer's request and to be determined under the NTSC process ordered by the Region. The Regional Director also fails to consider that the Union offers no evidence to dispute the fact that the compromise underlying the SEA was that it included all locations in New York City and that this

is no longer the case.[3] Indeed, the Order considers nothing having to do with unusual or special circumstances.

Given the absence of any analysis and the failure to consider the law, one must wonder what required nearly two months of consideration by the Region to issue the Order. The reality is that the Region appears to have utilized the NTSC process as a means to delay the election so that the Region's employees would not be called upon to report to work during this incredibly difficult time of COVID-19. The Employer sympathizes with this position and respects the Region's need to delay proceedings. That said, what the Employer can neither condone nor accept is that instead of considering what the NTSC required and the changes this extraordinary delay produced, the Region appears to have simply hit the restart button instead of actually evaluating the circumstances that warrant the Employer's withdrawal from the SEA.

In doing so, the Region focuses on its own operations instead of those of the Employer. While the Region can simply restart its business of processing elections after a long delay, the Employer did not merely just continue its business uninterrupted since the election was paused on March 19, 2020. This Employer's business has changed dramatically as a result of adapting to the pandemic and because of this the SEA must be vacated as it now no longer fits the Employer's business as was originally intended.

As demonstrated more fully below, since the SEA was executed, the Employer has added nearly 126 new employees in the same job classifications covered by the SEA, and has opened five (5) new work locations and/or new lines of business within New York City. The Employer operates (A) a new COVID shelter in Long Island City, (B) a new testing business at multiple

[3] The Union falsely argued in its Reply Brief (Exhibit F) that the parties had excluded the SMART location in New York, but as rebutted by the Employer (a) there was no SMART location and (b) the three (3) remaining SMART positions at the time of the SEA were excluded because they had been notified of their termination and the formal end of their program (Exhibit G).

existing and new locations, (C) newly added health care operations at the Long Island City shelter, at another new shelter on 48th Street (the "48th Street Shelter'), and at another new shelter on Williams Street (the "Williams Street Shelter"), and (D) a newly opening Stabilization Center on Northern Boulevard. In addition to the nearly ninety (90) employees these locations and businesses have added since the SEA was approved, the Employer expects that these new locations and new businesses will, in the very near term, add an additional 150 employees in the very same job classifications covered by the SEA. In addition, the Employer has closed three operating locations covered by the SEA. In this time period, 108 employees have permanently ceased employment with the Employer and an additional 10 employees have moved employment to new locations not covered by the SEA. Thus, though these 10 transferred employees work in classifications that would be covered by the SEA, but they will not be permitted to vote because their work location is not covered by the SEA. Compare this to the 70 employees that transferred from included locations to other included locations during the hiatus since the SEA. Under the Order, there will be a massive number of new and existing employees that will not get to vote in this election and the original purpose of the SEA will be vanquished. In sum, the original list of 600 eligible voters as of February 15, 2020 has only 482 remaining voters. As of today, it excludes at least 136 other employees (most new and some old) working in covered classifications within New York City. In total, this represents a 41% change from the original SEA (244 divided by 600). When the full complement of new employees is hired, there will be a 66% change (394 divided by 600) from the unit approved in the SEA and 270 to 300 employees working in included classifications will have no vote. We submit that while this is no one's fault, these factors demonstrate the essence of unusual or special circumstances and the Regional Director's pressing of the re-start button in lieu of analyzing these facts is manifest error.

Housing Works adapted to survive and radically changed its business because of COVID-19. In the process, the SEA no longer serves its desired purposes. What was once an agreement to conduct an election (albeit in an inappropriate, but agreed upon unit) of employees working in included classifications at **ALL NEW YORK CITY LOCATIONS** now currently is ordered to proceed as an election among a mere fraction of the employees working in (or who will work in) included classifications at **SOME, BUT NOT ALL, NEW YORK CITY LOCATIONS**. Effectively, the Regional Director has changed the very purpose of the SEA through the issuance of her Order.

In reaching this flawed directive, the Region never considered whether unusual or special circumstances exist. There is no analysis of what has taken place. There is no reference to or examination of the Employer's efforts to largely shift its business focus to adapt to the pandemic. There is only the obvious and irrelevant conclusion that the parties and the Region can determine who is eligible and who is not eligible based upon a February 15, 2020 eligibility date. Of course the parties can determine eligibility based on a date but that is irrelevant.

The Regional Director's conclusion regarding, and her examination of, such a basic, obvious point that concerns a subject that is neither argued by the Union nor defended by the Employer renders the Order defective. Given this failure, pursuant to Section 102.67 of the NLRB's Rules and Regulations, the Order must be reversed.[4] In light of the undisputed facts submitted by the Employer and unrefuted by the Union, it is manifest that the Board must enter an order permitting the Employer's withdrawal from the SEA, or otherwise vacating the SEA and/or dismissing the Petition. While the Employer remains willing to negotiate and execute a new stipulated election agreement covering the same included and excluded classifications at all New

[4] Oddly, the Regional Director provided that the Employer has a Right to Request Review under Section 102.69(c)(2) of the Board's Rules and Regulations as opposed to Section 102.67.

York City locations, this should not occur unless and until the Union can demonstrate that it is supported by a valid showing of interest among all eligible employees currently employed in the included classifications throughout New York City.

II. RELEVANT PROCEDURAL BACKGROUND

Sometime in 2018, the RWDSU began an organizing effort among the nearly 800 employees, professionals, supervisors and managers employed by the dozens of single purpose entities that comprise the Housing Works organization. On October 29, 2019, the RWDSU incited a poorly-attended strike ("Minority Job Action") against Housing Works at which less than 100 individuals (including some small portion, perhaps 60-80, of Housing Works employees) participated for approximately two (2) hours. The Minority Job Action was allegedly undertaken to demonstrate majority support for the RWDSU among Housing Works employees in the hope to compel a card check recognition and a neutrality agreement upon Housing Works. In response to this action, Housing Works publicly echoed what it had been saying privately to its employees for months at that point: it desired to remain neutral in any organizing effort, welcomed employees to voice their support for or rejection of the Union, permitted employees (subject to certain requirements) to schedule on site meetings with the Union for an extended period of time, promised to adhere to the majority's desires as expressed in a secret ballot vote, and expressed doubt that the Union held majority status.

Following the Minority Job Action, the Union sought a meeting with the Employer to discuss terms for an election agreement. In December, the parties met and thereafter exchanged multiple drafts of a private election agreement ("PEA"). On January 30, 2020, the Employer presented the Union with its final version of the PEA, which the Union rejected because the PEA

required a real majority to certify the Union. Importantly, this PEA contained, among other things, a unit of employees across all of the Employer's locations in New York City.

On February 14, 2020, the Union filed its Petition. Recognizing the obvious defects in the petitioned-for unit and the complexities that needed to be considered, the Employer requested and the Region granted an adjournment of the hearing for eight (8) days to permit the parties to work out what was a very complicated and detailed SEA. The Employer fully cooperated with the Union in negotiating a New York City wide bargaining unit notwithstanding that the Petition contained multiple errors and was not for a unit that legally shared a community of interest. The Employer even provided the Union with employee lists prior to executing the SEA. Even though the Petition did not originally reference all New York City locations (two were missing), this was mere oversight by the Union and the parties never disagreed that the totality of covered locations would be only those that were (or are) in New York City. Much of the parties' debate centered on which of the 200-plus classifications should be included or excluded, and which of them were professional employees and which were non-professional employees. The Petition incorrectly excluded or included dozens of classifications and the Union was unaware of the professional/non-professional distinction among the petitioned for employees. In the end, and as the SEA reflects, all Employer locations in New York City were included, a short date was arranged for mailing, a list of over 100 included and over 110 excluded job classifications was created by the Employer's hard work, and an election was ready to proceed on March 20, 2020. The Voter List utilizing a February 15, 2020 eligibility date covered 600 eligible employees.

Those facts underscore that the Region and the Employer did everything they could to help ensure that a New York City wide bargaining unit (that the Union wanted) came to be. The Employer did so notwithstanding the dubious community of interest among 600 employees in over

100 classifications working at nearly 30 different nominal employers. Indeed, in the interest of having one election to cover a single unit for New York City and to permit all employees to vote at one time, the Employer chose to agree to this overarching bargaining unit and to forego a hearing. Through no fault of its own, the Employer's operations are no longer captured by the SEA. Thus, the Order threatens to compel Housing Works to proceed with an election under terms to which it never would have agreed.

On March 19, 2020 the NLRB ordered all elections to pause until April 3, 2020. On April 1, 2020 the NLRB ordered that elections could resume on April 6, 2020 subject to Regional Director discretion. Upon information and belief, on April 1, 2020, the Union notified the Region of its request to proceed with the SEA. On April 5, 2020 the Employer notified the Region of its request to renegotiate the SEA based on the extraordinary or changed circumstances brought about by COVID-19. On April 23, 2020 the Region issued the NTSC to determine whether the "Employer's request to withdraw from the [Stipulated Election] Agreement should be granted."

On May 4, 2020, counsel for the Employer, counsel for the Union, Union organizer Adam Obernauer and Board Agent Ioulia Fedorova had a telephone conference to discuss the parties' positions and to determine whether the parties could come to an agreement to proceed under the SEA or come to an agreement on a new stipulated election agreement ("New SEA"). The Employer maintained that it would not be appropriate to proceed under the SEA and that it is necessary to negotiate a New SEA. The Union maintained that an election can proceed under the SEA with the Regional Director simply providing new election dates and changing nothing else. The telephone conference ended with the parties failing to reach an agreement and Board Agent Fedorova instructing the parties to respond in writing to the NTSC. Given the results of this call, it is undisputed that the parties do not mutually consent to continuing under the SEA.

On May 12, 2020 the Employer responded to the NTSC (Exhibit E). On May 19, 2020, the Union filed its reply (Exhibit F). On May 22, 2020, the Employer filed its sur-reply (Exhibit G). On May 25, 2020, the Union filed its reply to the Employer's sur-reply (Exhibit H). On July 7, 2020, the employer filed an updated letter indicating the status of changed circumstances (Exhibit I). On July 9, 2020, the Regional Director issued the Order denying the Employer's request to withdraw from the SEA.

III. RELEVANT FACTUAL BACKGROUND

For the last four months, Housing Works, like the rest of the United States, has been dealing with the COVID-19 pandemic. While the Housing Works community has no doubt proven its unique resiliency during this time of crisis, the Employer's enterprise has undergone monumental operational changes vital to its survival and continued success. Because of this, the SEA no longer fits the situation and it is no longer agreeable to Housing Works.

Since the SEA was approved on March 5, 2020, Housing Works has built entirely new business lines in this COVID-19 world. Indeed, Housing Works has added five new work locations and/or business lines in New York City. Housing Works was awarded and assumed the operation of a COVID-19 homeless isolation shelter in Long Island City. In addition, the Employer was awarded the health care services contracts at this center and two other centers (48th Street Shelter and Williams Street Shelter). Also, Housing Works was awarded contracts to perform testing at multiple existing and new locations. As of July 18, 2020, these new isolation centers and new businesses currently employ approximately 90 new employees with the expectation to employ an additional 80 new employees. Housing Works is also assuming the operation of a stabilization center in New York City to care for and provide life services to homeless New York City residents who were displaced from the streets and subway stations due

to COVID-19. The stabilization center is expected to employ around 70 new employees in the immediate near term. The Employer's COVID-19 virus testing operations that occur at multiple, existing New York City locations employs 15 new employees and is in the process of adding 30-40 new employees. Importantly, these new employees at the new NYC work locations and new businesses work in job classifications that are covered by the SEA. However, because the new locations or businesses are not listed as included and because they were hired after February 15, the employees will not get to vote.

In addition, since the SEA was approved on March 5, 2020, Housing Works has permanently closed three work locations that were covered by the SEA due to the economic impact of COVID-19. In this time period, the Employer has also lost 108 employees as a result of layoffs and turnover with no expectation to rehire these positons as a result of the impact of COVID-19 on the operations. The total employees laid off and/or who no longer work for Housing Works represent 18% of the employees on the Voter List.

Further, since the SEA was approved on March 5, 2020, 10 employees on the Voter List have transferred from a covered New York City location under the SEA to work at one of the Employer's five new NYC work locations and/or businesses.[5] Every one of the employees who has transferred to a new uncovered work location in New York City holds a job classification that, but for its location, would be included in the SEA. There is a large group of employees that were interchanged to locations that will be permitted to vote and there is a group of 10 employees that were interchanged that are being disenfranchised.

Taken in totality, since the SEA was approved on March 5, 2020, the number of new employees at existing locations (42), plus the number of employees at new work locations who

[5] As another illustration that the Employer's enterprise has undergone significant changes since the SEA was executed, 70 other employees on the Voter List have transferred from one covered work location to another cover work location.

hold a job classification provided for in the SEA (84), plus the number of employees on the Voter List who have terminated or who are no longer employed by Housing Works (108), plus the number of employees on the Voter List who have transferred to a new uncovered work location (10) represents a change of 244 employees - or 41% of the Voter List.

IV. THE REGIONAL DIRECTOR'S ORDER FAILS TO ACKNOWLEDGE, ADDRESS OR ANALYZE ANY OF THE EMPLOYER'S ARGUMENTS

Pursuant to Section 102.67(c) of the National Labor Relations Board's ("NLRB" or "Board") Rules and Regulations, the Board may grant review of "any action of a Regional Director." *See* NLRB RULES & REGULATIONS § 102.67(c). Specifically, review may be granted where: (1) a substantial question of law or policy is raised because of: (i) the absence of; or (ii) departure from, officially reported Board precedent; (2) The Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the right of a party; (3) The conduct of a hearing or any ruling made in connection with the proceeding has resulted in prejudicial error, or; (4) There are compelling reasons for reconsideration of an important Board rule or policy. *See* NLRB RULES & REGULATIONS § 102.67(d). The Employer's Request for Review in this case is premised on all (4) four grounds.

As an initial matter, the Order appears to wholly discount that stipulated election agreements are a product of the parties voluntary agreement to enter into an election agreement. As made clear by Housing Works, and as evident in the SEA, a foundation of the parties reaching agreement on the SEA was that the bargaining unit be comprised of all of the Employer's New York City locations. The SEA no doubt contains "specific locations" as admitted by the Union, but each "specific location" shares the same common denominator - a geographic location in New York City. There are no locations in New York City that were excluded from the SEA and all were included. This will no longer be the case if the Order is not vacated.

This agreement of the parties to include a New York City wide bargaining unit that is memorialized in the SEA is buttressed by the following points: (A) As admitted by the Union, the SEA clearly excludes employees working in Haiti, Puerto Rico, Albany, NY, Washington, DC. excluded locations that share the same common denominator of being located outside of New York City; (B) the Union's Petition mistakenly failed to include two (2) then-existing New York City work locations the Employer operated that were ultimately added to the SEA. Indeed those were (1) Lyman Residence - 1344 Elmo Hope Way, Bronx, NY and (2) Prospect Residence - 1412 Prospect Ave, Bronx, NY; and (C) even more, in Exhibit B of the Petition, the Union, in response to question 5a (which asks which City and State the unit will be located), provided the unit will be in Brooklyn, New York, Long Island City, New York, Forrest Hills, New York, New York, New York and the Bronx, New York - all areas within the 5 boroughs of NYC. There were other minor edits to the names and addresses of included NYC locations, but RWDSU agreed that all of these corrections (including the two locations they missed) made by Housing Works should be reflected in the SEA.

The Order simply does not honor the parties intent underlying the SEA. What was once an agreement to conduct an election of employees working in included classifications at all of the Employer's New York City locations has now been ordered to proceed as an election among some, but not all, of the Employer's New York City locations. Absent the parties' agreement on a complete bargaining unit spanning all New York City locations, the Petition sets forth a bargaining unit to which the Employer would not, and does not, consent. Candidly, in the absence of the Employer's voluntary agreement, this number of classifications across this many business, at this many locations does not have a suitable community of interest under Board policy and case law provides that stipulated election agreements should not be enforced if their terms are unclear,

ambiguous and/or contravene express statutory exclusions or established Board policy. *See Business Records Corp.*, 300 NLRB 708 (1990); *see also Granite and Marble World Trade*, 297 NLRB 1020 (1990). While the Employer is still willing to proceed under an election agreement that includes all the New York City locations, it is not willing to proceed under a fragmented, incomplete election agreement that no longer matches the shape and size of the organization.

Regarding the holding in the Order, the Regional Director failed to undergo an examination of whether "unusual or special circumstances" exist to permit Housing Works to withdraw from the SEA. In this regard the Order concluded, without any analysis, the following:

> "I do not find such unusual special circumstances here that would warrant changes to the terms of the stipulated election agreement..." Ord. at 4.
>
> "The Employer's concerns about laid off and newly hired employees and work sites can be handled using the Board's established eligibility rules and challenged ballot procedures. To be eligible to vote in a Board election, the employee must be hired and working on the established eligibility date and in employee status on the date of the election…" Ord. at 4.
>
> "The eligibility and employment status of the Employer's newly hired and laid off employees are not such unusual or special circumstances which would necessitate the abrogation of the existing agreement or require a new stipulated election agreement. Rather, the Region will use the Board's established rules and procedures for dealing with eligibility issues at the election…" Ord. at 5.

In its most simple terms, the Regional Director failed to answer the question posed by the NTSC. The Employer was not raising questions with regard to individual voter eligibility. Rather, the Employer was asserting that the operational changes imposed on and made by the organization as a result of COVID-19 constitute unusual or special circumstances, especially in light of the pandemic that brought them about. That the SEA no longer honors the parties' agreement that a bargaining unit be comprised of included job classifications at all New York City locations drives this point home.

If the effects of the pandemic on Housing Works, and its subsequent response, do not constitute unusual or special circumstances, quite frankly, nothing can. Based on the record evidence, no one can dispute that as a result of the pandemic the Employer's enterprise has drastically changed. The Order wrongly permits the Union to evade the purpose and the intent of the SEA - that a bargaining unit be comprised of all the Employer's New York City locations. Additionally, the Order penalizes Housing Works for being nimble, re-thinking its business approach and successfully adjusting its operations, including its workforce, in the face of a global pandemic.

The holding in *Hampton Inn & Suites*, 331 NLRB 238 (2000), is instructive to the analysis here. In that case, the Board held that the Regional Director did not err by continuing the effectiveness of an election agreement even though the union there filed a second petition on the same day the initial election agreement was approved. In doing so, the Board commented as follows:

> Further, the Employer, who was represented by counsel during this proceeding, was not deprived of its right to raise any unit issues when negotiating the election agreement. The Employer's counsel knew, or at the very least should have known, that by stipulating to the appropriateness of the unit in this case, it was opening up the possibility that this Union or another union could organize and seek to represent employees in a unit comprising either part or all of its remaining employees. Nevertheless, the Employer decided, in the interest of expeditious handling of a representation case, to concede the appropriateness of the unit, and it is the Board's practice to honor that concession, even though the Board may have reached a different result upon litigation. *Highlands Regional Medical Center, supra*. The Board has long held that a stipulated unit will not be cast aside solely because it designates a unit we might find inappropriate had resolution of the issue not been agreed upon by the parties. *Otis Hospital*, 219 NLRB 164, 165 (1975); *The Leonard Hospital*, 220 NLRB 1042 (1975). Thus, even assuming that the stipulated unit is an inappropriate one, we will give full force and effect to that stipulation, provided that it does not contravene the provisions of the Act or established Board policy. Inasmuch as the Employer has not

> shown that the stipulated unit contravenes statutory or established Board policy, we shall hold the Employer to its stipulation.

Id. 239-240. Here, both the circumstances and the result are entirely different. The parties did not knowingly exclude these new NYC locations. Rather, the parties crafted into the SEA an agreement to include a vast number of classifications and all New York City locations. Housing Works does not object because the Union has filed another petition, it objects because the parties can no longer honor the terms and the intent of the original SEA. By failing to consider this, the Regional Director has erred.

As a result of COVID-19, the entrepreneurial direction of the Employer and its direct effect on Housing Works operation and workforce, is readily apparent. As the facts demonstrate, since the SEA was executed, Housing Works has been awarded and has assumed work at multiple additional housing locations in New York City (three COVID-19 isolation shelters and one stabilization center) and has opened new testing facilities at multiple locations. In sum, the original list of 600 eligible voters as of February 15, 2020 has only 482 remaining voters and as of today it excludes at least 136 other employees (most new and some old) working in covered classifications within the City of New York that are not included in the SEA. In total, these departures and additions represent a 41% change from the original SEA (244 divided by 600). When the full complement of new employees is hired at the new locations and businesses (which is imminent), there will be a 66% change (394 divided by 600). This is not just unusual or special, it is an enormous shift in the business and it renders proceeding under the old SEA nonsensical.

The Order's haphazard response to these new locations/business and new employees that "the Region will use the Board's established rules and procedures for dealing with eligibility issues at the election" simply does not address whether the Employer's wholesale operational reorganization as a result of COVID-19 constitutes unusual or special circumstances. As illustrated

above, the overall effect on the Voter List does answer that question and does so resoundingly. The Regional Director examined none of these factors and simply told the parties what was already known - how to figure out what the old eligibility date would mean if applied to an election five (5) months later.

The Order also lends zero credence to the Employer's position that any stipulated election agreement must be a reflection of Housing Works organization in this new COVID-19 world we all live in. As was true when the Petition was filed, no Region should order an election among a unit that can only be agreed-upon and that would not be ordered under the law. Contrary to *Hampton Inn & Suites,* where the parties had agreed to one unit and the union wanted petitioned for a second unit of different classifications, the Union here is demanding to proceed where there are new employees and new locations that match the terms and intent of the SEA, but which are not going to vote. This is not the instance of an Employer trying to avoid its obligations under the Act. Rather, this is an Employer who is trying to ensure that the parties' intent when executing the SEA is preserved and honored while simultaneously ensuring that no eligible employee be disenfranchised from voting, as the Order so clearly does.

Similarly, as the facts also demonstrate, since the SEA was executed, and as a result of COVID-19, Housing Works has permanently closed three locations, been forced to evaluate the long term viability of its brick-and-mortar retail spaces (i.e. thrift shops) and has furloughed over 150 employees, experienced a loss of over 120 employees as a result of layoffs and turnover with no expectation to rehire these positons as a result of the impact of COVID-19 on the operations.

These drastic changes in the composition of the Voter List underscore the unusual or special circumstances imposed on Housing Works as a result of COVID-19. The Order's conclusion that "the Board's established rules and procedures" can sort out eligibility simply does

not answer the question posed by the Regional Director in the NTSC. The relevant facts, however, do answer that. A global pandemic that has caused an employer to adapt its operational direction in real time and that has rendered the existing Voter List absolutely unrelated to the parties' agreement constitutes such unusual or special circumstances that would allow Housing Works to withdraw from the SEA.

The Order also does not consider the Union's seeming admission that the employees at the new locations/businesses should or would be admitted to the voting unit, but for the fact that the RWDSU argues they are temporary employees that are ineligible to vote. (Exhibit F). This argument should have been critical to the Regional Director's finding on the issue, but she did not consider it. Indeed, as previously provided by the Employer, if the employees at the COVID-19 isolation shelters or in the other new businesses are temporary, then the vast majority of all Housing Works employees are temporary. If this is true, the SEA must be vacated, and there should be no election (Exhibit G). In this regard, all of the housing contracts Housing Works has with New York City are for fixed terms - most are for one year and are renewed if the parties are agreeable. Some of Housing Works' contracts are for longer periods, but they are all for finite terms and thus the Union, in its effort to avoid adding the new NYC locations, essentially asserts that none of the employees under any fixed contracts are regular employees. Indeed, over twenty contracts Housing Works has with New York City , New York State or the Federal Government are for a one year term. Under the Union's logic, all of the employees who work in the housing locations or other locations covered by contracts for a fixed term must be excluded from the SEA. Despite this, the Order completely ignores the issue.

By deciding to proceed with a mail ballot election under the terms of the SEA "but on the dates and times listed in the Attached Notice of Rescheduled Election" the Regional Director failed

to give credit to the Board's own Casehandling Manual which confirms that the eligibility date in an election is not some sort of immovable object. Indeed, Section 11312.1 provides that the Region has full authority to establish an unusual eligibility date, i.e. the use of a date other than the payroll period ending before the approval of the agreement because of certain circumstances. The Employer recognizes that when negotiating a stipulated election agreement, the norm is to set eligibility based on the last payroll period prior to approval of the agreement. However, as made clear by the Employer, any attempt to impose normal considerations to a clearly abnormal circumstances is simply not appropriate. Most unusually, the Region did not adjust the date of the eligible voter list, as it is permitted to do and should have done. Indeed, the Region orders that the parties move forward with a voter list from February 15. This will ensure that there will be up to 200 challenges that will make an already bizarre election into pandemonium. At a minimum, 118 employees are ineligible former or current employees at excluded locations will receive ballots, 126 new employees at existing or new locations will not receive ballots and up to 150 more are to be hired in the immediate short term.

Finally, that the Regional Director would issue an Order that has a disproportionally large impact on the Voter List, that prejudicially affects Housing Works and clearly disenfranchises potential voters is clear error. As highlighted above, the composition of the bargaining unit now is markedly different than it was when the SEA was executed. Indeed, given the number of employees at new work locations who hold a job classification provided for in the SEA, the number of employees on the Voter List who were laid off or no are no longer employed by Housing Works, and the number of employees on the Voter List who have transferred to a new uncovered work location, the composition of the Voter List is over 50% different than it was when the SEA was

executed. This change alone constitutes evidence that unusual or special circumstances have been imposed on Housing Works as a result of COVID-19.

V. THE BOARD SHOULD STAY THE ELECTION UNTIL IT GRANTS THE EMPLOYER'S REQUEST FOR REVIEW AND DETERMINES THAT THE REGIONAL DIRECTOR'S ORDER WAS ERRONEOUS

An analysis of the record evidence under Board precedent compels the conclusion that the Regional Director wrongfully determined the Order. It is thus imperative that the Board stay the further processing of the Petition and the holding of the election until the Board grants the Employer's Request for Review and determines that the Regional Director's Order was inaccurately decided.

A stay would prevent the waste of time and money of both the Union and the Employer until this issue is resolved. It would also protect the integrity of the election. Therefore, for all the foregoing reasons, the election should be stayed. *See Piscataway Assocs.*, 220 NLRB 730 (1975); *see also Angelica Healthcare Servs. Group*, 315 NLRB 1320 (1995).

VI. CONCLUSION

For the foregoing reasons, the Employer should be permitted to withdraw from the SEA and the Union should be compelled to refile its Petition in the absence of renegotiating an election agreement that comports with the intent of the original SEA.

Respectfully submitted,

/s Glenn J. Smith

Glenn J. Smith, Esq.

Dated: July 21, 2020

SEYFARTH SHAW, LLP
Attorney for the Employer
Housing Works, Inc.

CERTIFICATE OF SERVICE

I, Glenn J. Smith, Esq., certify that on this date I caused a copy of the foregoing Employer's Request For Review Of The Regional Director's Order And Request To Stay Election to be served via Electronic Filing through the Board's website and via E-mail upon:

Kathy Drew-King, Regional Director
National Labor Relations Board, Region 29
100 Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-4201
Kathy.King@nlrb.gov

Ioulia Fedorova, Board Agent
National Labor Relations Board, Region 29
100 Myrtle Avenue, Suite 5100
Brooklyn, New York 11201-4201
Ioulia.Fedorova@nlrb.gov

Larry Cary, Counsel for Petitioner
Cary Kane, LLP
1350 Broadway, Suite #1400
New York, New York 10018
lcary@carykane.com

By: /s/ *Glenn J. Smith*

Date: July 21, 2020